IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO.640 OF 1997

Tukaram Maruti Nirmal,
Hirji Govind Chawl,
Seweree, Zakeria Bunder Road,
Mumbai - 400 015. ...Appellant.

V/s

The State of Maharashtra ...Respondent.

Mr. Shirish Gupte, Sr. advocate with Mr. Prakash Naik, advocate for the appellant.

Mr. V.R. Bhonsale, APP for the State.

CORAM: V.G. PALSHIKAR & R.C. CHAVAN, JJ.

DATE: 26th July, 2005

ORAL JUDGMENT: (Per. R.C. Chavan, J.)

1. This appeal arises out of conviction of the appellant - accused No.1 in Sessions Case No.361 of 1984 for the offence punishable under section 302 of the Indian Penal Code before the Additional Sessions Judge, Greater Bombay.

2. Facts which led to the prosecution of the appellant are as under:-

. Deceased Indrajeet Jaiswal was residing at Kalachowky, Mumbai where all the accused too reside. The deceased was in transport business. On 7/1/1984,

accused No.3 Prakash had filed complaint against Indrajeet for assault and Indrajeet was arrested and, possibly, later bailed out. On 26/1/1984, Indrajeet was leaving for his work at about 6.25 p.m. and hailed a taxi. Accused No.3 - Pakya (Prakash) removed the ignition key and the other three accused surrounded the taxi. Fearing threat to his life, Indrajeet alighted from the taxi and ran towards his house. All the four accused gave a chase and on the second floor of their residential building caught up with the victim. Accused No. 1 - Tukaram gave blows by knife when the other three had held the victim. They dragged the victim to the ground floor where accused No.1 Tukya (Tukaram) again hit him with knife. Accused No.3 assaulted the victim with stone. Accused Kishore and Ramya (Ramakant) baring knives had pinned down the victim. The victim was shifted to K.E.M. Hospital by Sudhir Kamble and Prakash Shirke and the police were informed. Police registered an offence on report of Sudhir and also recorded statement of the victim. The victim, however, succumbed to his injuries on 28/1/1984.

3. In course of investigation, police caused inquest to be performed on the dead body, sent it for post-mortem examination, recorded statements of witnesses, seized incriminating articles, sent them to

the Forensic Science Laboratory and, on completion of investigation, chargesheeted all the accused.

4. Upon commitment of the case by the learned Metropolitan Magistrate, the learned Additional Sessions Judge Greater Bombay, framed a charge of offence punishable under section 302 read with section 34 of the Indian Penal Code against the accused Tukaram, Prakash and Ramakant since accused Kishore had, in the meantime, died. Accused pleaded not guilty and were put on trial.

5. In its attempt to bring home guilt of the accused, prosecution examined in all 12 witnesses. Upon consideration of evidence of these witnesses, in light of defence taken by the accused in their statements under section 313 of the Criminal Procedure Code, the learned Additional Sessions Judge proceeded to convict the accused No.1 - Tukaram of the offence punishable under section 302 read with section 34 of the Penal Code and sentenced him to suffer rigorous imprisonment for life and fine of Rs. 500/-. He acquitted the other two accused. Aggrieved thereby, this appeal has been filed.

6. We have heard the learned Counsel appearing for the appellant and the learned Additional Public

Prosecutor. We have reappraised the entire evidence in order to examine correctness of the findings recorded by the learned trial judge.

7. There can be no doubt that the deceased Indrajeet met with homicidal death as could be seen from the notes of post-mortem examination at Exhibit-20 proved by P.W.6 - Dr. Geeta Natraj. The victim Indrajeet had been admitted to K.E.M. Hospital on 26/1/1984 at about 7.30 p.m. and was under treatment of P.W. 8 - Dr. Bapat. Dr. Bapat proved his injury certificate at Exhibit-27 which shows that there were six incised wounds and CLW on bridge of nose. Exploratory laparotomy (i.e. a surgical operation to find out damage to internal organs) was conducted and it was found that there were number of tears to the liver, tear in lesser omentum, a tear communicating with thoracic cavity, perforation of stomach, etc. Dr. Bapat stated that the patient died and cause of death was mentioned at page No.40 in the case papers at Exhibit-28. Dr. Bapat stated that injuries were possible by weapons which were shown to him. In view of this medical evidence, the conclusion by the learned Additional sessions Judge that the victim met with his death on account of homicidal injuries inflicted upon him has to be upheld.

8. The main question is : whether the learned Additional Sessions Judge was right in concluding that the appellant was the author of those injuries? Complainant P.W. 1 - Sudhir who gave First Information Report at Exhibit-11 turned hostile and did not prove the contents of the F.I.R. The other eye witness P.W. 3 - Ramesh also turned hostile. Panchas P.W. 2 - Shashikant, P.W. 4 - Krishna and P.W. 5 - Vishnu also turned hostile and did not support the prosecution. Thus, there is absolutely no eye witness account about the manner in which the incident occurred. Prosecution case rests solely on the account of the incident given by the deceased Indrajeet to P.W. 10 - API Jadhav in presence of P.W. 7 - Dr. Karmarkar.

9. P.W. 7 - Dr. Karmarkar stated that on 27/1/1984, at about 10.30 a.m., Shri Jadhav (P.W. 10) came to him and asked him whether Indrajeet was in a position to make statement. Dr. Karmarkar examined the patient and found that the patient was well oriented, his condition was stable and hence he permitted the Police Officer to record the statement. Police Officer recorded the statement in presence of Dr.Karmarkar on which Dr. Karmarkar made an endorsement. While the evidence of this witness was being recorded, it was noticed that the endorsement by

the doctor was not to be found in the copies supplied to the defence as well as to the Special Public Prosecutor conducting the case. Dr. Karmarkar denied the suggestion that he had not examined the patient but admitted that he had not specified that the statement was recorded in his presence.

10. P.W. 10 - API Jadhav stated that he accompanied PI Bansode and Constable to K.E.M. Hospital for recording statement of the injured. He stated that the injured spoke for some time and then became unconscious. This incomplete statement of the victim is at Exhibit-39, which says that the victim knew Pakya, Tukya, Kishore and Ramya as they are staying at Wakali Chawl since long and they have assaulted him on that day. The statement bears signature of Sub-Inspector of Police, Kalachowky but not that of the victim. Doctor who made endorsement on the certificate is neither named nor examined.

11. P.W.10 -API Jadhav then stated that on 27/1/1984, at about 10.00 a.m., he again visited K.E.M. Hospital and, after consulting doctor, had recorded statement of Indrajeet Jaiswal which is at Exhibit-23 and which bears an endorsement of Dr. Karmarkar. It may be seen that both the statements at Exhibits 23 and 39 do not bear signature of the victim. The endorsement of

doctor in both the statements is in the margin and made in a manner which may show that it was made after the entire document was written. Instead of writing horizontally, the endorsement is made vertically on these two pieces of paper. The statement is in English i.e. not in the language in which Indrajeet would have ordinarily made it. It is not in question answer form. All these aspects create serious doubt about the correctness of the record made. If the victim had passed out while attempt to record his statement on 26/1/1984 was being made, it is not clear as to how he was in a position to make a lengthy statement on 27/1/1984. Therefore, these two documents,in themselves,can be hardly adequate to nail the appellant.

12. The evidence of other two witnesses P.W. 11 - PI Bargaje and P.W. 12 - API Bangale is not material. P.W. 11 - Bargaje was not the Investigating Officer but accompanied PI Bansode who expired. Thus, the witness (P.W 11 - Bargaje) merely identifies writing of PI Bansode. P.W. 12 - API Bangale states about destruction of case diaries and consequently justifies their non-production before the Court.

13. This being the state of affairs, we find it impossible to concur with the learned Additional

Sessions Judge and uphold conviction of the appellant on the basis of statement recorded by API Jadhav (P.W.10). If API Jadhav was in a position to record the statement and since he states having known the requirement that such statement should be recorded by a Magistrate, there is no reason why the investigating machinery did not secure the presence of a Magistrate for recording the dying declaration of the victim.

14. In the result, we allow the appeal, set aside conviction of appellant of the offence punishable under section 302 of the Indian Penal Code and acquit him of the said charge. The bail bond, if any, furnished by the appellant shall be cancelled and fine, if any, paid by him shall be refunded.

(V.G. PALSHIKAR, J.)

(R.C. CHAVAN, J.)